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IN THE COURT OF APPEALS OF INDIANA

MICHAEL KELNHOFER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 79A02-0611-CR-1057
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE TIPPECANOE CIRCUIT COURT
The Honorable Donald L. Daniel, Judge
Cause No. 79C01-0512-MR-3

September 7, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Michael Kelnhofer appeals his convictions and sentence for Class A felony voluntary manslaughter and two counts of Class B felony serious violent felon in possession of a firearm. We affirm.

Issues

Kelnhofer raises three issues, which we reorder and restate as:

I. whether the trial court properly denied his motion for change of judge;

II. whether the jury was properly instructed regarding his claim of self-defense; and

III. whether the trial court properly sentenced him to enhanced consecutive sentences.

Facts

Kelnhofer and Jamie Gallivan had been life-long friends. In April 2005, their relationship became troubled, apparently over a woman. On April 26, 2005, Gallivan, his father, and his father's friend went to Kelnhofer's house to retrieve a gun. Gallivan's father knocked on Kelnhofer's door, and no one answered. Gallivan's father returned to the van in which they had arrived. Gallivan got out of the van, went to a neighbor's house, spoke with the neighbor, and then knocked on or kicked Kelnhofer's door. Kelnhofer opened the door and shot Gallivan in the chest with a rifle. Gallivan fell to the ground and died soon thereafter.

Later that day, Kelnhofer was apprehended by the police at a relative's house. In a statement to police, Kelnhofer said that the rifle and a shotgun were located in a wooded area near his house.

On December 21, 2005, the State charged Kelnhofer with murder and two counts of Class B felony serious violent felon in possession of a firearm. On January 3, 2006, pursuant to Indiana Trial Rule 76, Kelnhofer moved for a change of judge because the same judge had presided over a civil matter based on Gallivan's death. The trial court denied the motion.

On August 17, 2006, a jury convicted Kelnhofer of Class A felony voluntary manslaughter. In a separate trial, the jury convicted Kelnhofer of the firearm charges. On September 29, 2006, the trial court sentenced Kelnhofer to forty-five years on the voluntary manslaughter conviction and fifteen years on each of the firearm convictions. The trial court ordered the sentences to be served consecutively for a total sentence of seventy-five years. Kelnhofer now appeals.

Analysis

I. Change of Judge

Kelnhofer first argues that the trial court improperly denied his motion for change of judge. In his motion to the trial court, Kelnhofer specifically referred to Indiana Trial Rule 76. On appeal, he concedes that his motion did not comply with Indiana Criminal Rule 12. He argues that any objection to such error by the State is waived because the State did not object to the format of his motion at the trial court level.

Although the State may be precluded from arguing waiver as an affirmative defense, we may sua sponte find an issue foreclosed where a party has failed to take the necessary steps to preserve the issue. See Bunch v. State, 778 N.E.2d 1285, 1287 (Ind. 2002). This judicial doctrine is described as "procedural default" or "forfeiture" instead of waiver. Id. We may determine, and the State may suggest, that an issue is foreclosed under a wide variety of circumstances. Id. at 1289.

Kelnhofer's motion to the trial court was based on Indiana Trial Rule 76(B), not Indiana Criminal Rule 12(B). Accordingly, his claim that the trial court improperly denied his motion based on the Indiana Criminal Rules is forfeited. See Saunders v. State, 848 N.E.2d 1117, 1122 (Ind. Ct. App. 2006) (observing that a defendant may not object on one ground at trial and raise another on appeal and that any such claim is waived), trans. denied.

This is not simply a matter of form over substance. Indiana Trial Rule 76(B) applies to civil actions and requires the granting of a change of judge motion "upon the filing of an unverified application or motion without specifically stating the ground therefor by a party or his attorney." Indiana Criminal Rule 12(B) governs change of judge motions in criminal cases. When such a request is made:

> The party shall timely file an affidavit that the judge has a personal bias or prejudice against the state or defendant. The affidavit shall state the facts and the reasons for the belief that such bias or prejudice exists, and shall be accompanied by a certificate from the attorney of record that the attorney in good faith believes that the historical facts recited in the affidavit are true. The request shall be granted if the historical facts recited in the affidavit support a rational inference of bias or prejudice.

Ind. Crim. Rule 12(B). Because the basis, the allegations supporting them, and the trial court's ability to grant or deny such a change of judge motion varies significantly from civil to criminal cases, this issue is not available for our review.

Nevertheless, even if Kelnhofer had properly preserved this issue by filing the motion and affidavit under Indiana Criminal Rule 12(B), he is not entitled to relief on appeal. Adjudicating a request for change of judge based on Indiana Criminal Rule 12(B) requires an objective, not subjective, legal determination by the judge. Voss v. State, 856 N.E.2d 1211, 1216 (Ind. 2006). The judge must determine whether the historical facts presented in support of the motion lead to a rational inference of bias or prejudice. Id. "A change of judge is neither automatic nor discretionary, but rather requires the trial judge to make a legal determination, not a self-analysis, of actual bias or prejudice." Id.

Kelnhofer's objection on appeal is based on the trial court presiding over the civil case against him and the trial court's determination that he was liable to Gallivan's estate. "Adverse rulings and findings by a trial judge from past proceedings with respect to a particular party are generally not sufficient reasons to believe the judge has a personal bias or prejudice." Id. at 1217. "The mere assertion that certain adverse rulings by a judge constitute bias and prejudice does not establish the requisite showing." Id.

As the trial court noted, it was not the fact finder in the criminal case, the jury was. Further, the burden of proof in a criminal case is higher than in a civil case. More importantly, at the hearing on the motion for change of judge, the trial court stated, "All

that I remember about the civil trial was that he was here and that he had an objection. I don't remember what the facts were, I don't remember what he testified to and it doesn't matter to me if I did remember what he said." Change of Judge Hr. Tr. p. 2. The mere fact that the same judge presided over the civil case is not enough to constitute a personal prejudice or bias against Kelnhofer. The trial court properly denied Kelnhofer's motion for change of judge.

II. Jury Instruction

Kelnhofer also argues that the jury was improperly instructed because it was not informed that he had no obligation to retreat in support of his claim of self defense. Instructing the jury is a matter within the sound discretion of the trial court. Gamble v. State, 831 N.E.2d 178, 185 (Ind. App. Ct. 2005), trans. denied. In reviewing a trial court's decision to give or refuse tendered jury instructions, we consider (1) whether the instruction correctly states the law; (2) whether the record supports the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given. Id.

On July 1, 2006, the self-defense statute was amended to read in part:

> (b) A person:
>
> > (1) is justified in using reasonable force, including deadly force, against another person; and
> >
> > (2) does not have a duty to retreat;
>
> if the person reasonably believes that the force is necessary to prevent or terminate the other person's unlawful entry of or attack on the person's dwelling, curtilage, or occupied motor vehicle.

Ind. Code § 35-41-3-2 (emphasis added). The jury was not instructed that Kelnhofer did not have a duty to retreat. See App. p. 623.

Kelnhofer, however, did not ask that the jury be instructed regarding the duty to retreat nor did he object that the trial court's self-defense instruction was incomplete or misleading. Accordingly, the issue is waived. See Smith v. State, 765 N.E.2d 578, 584 (Ind. 2002).

To overcome waiver, Kelnhofer argues that the failure to instruct the jury that he did not have a duty to retreat amounts to fundamental error. "The 'fundamental error' exception is extremely narrow, and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process." Mathews v. State, 849 N.E.2d 578, 587 (Ind. 2006).

In support of his fundamental error argument, Kelnhofer directs us to the State's closing argument in which it suggested that Kelnhofer had the opportunity to call the police[1] and that it would have been reasonable for Kelnhofer to chain the door. Specifically the State argued, "What's reasonable? What's reasonable? Oh, gosh there's a chain on that door. There's a chain on that door. Oh gosh, he could have attached it. Did he? No. . . ." Trial Tr. p. 430.

[1] We do not believe that the State's suggestion that Kelnhofer had the opportunity to call the police goes to whether he could have or should have retreated.

Assuming the amended statute applies and this line of argument was inappropriate, we cannot conclude that the manner in which the jury was instructed amounted to fundamental error. The State's closing argument covered approximately nine and half pages of the transcript. Further, the trial was conducted over three days during which approximately twenty-five witnesses testified and numerous exhibits admitted into evidence. Given the extensive argument and evidence in this case, this brief line of argument by the State was not a blatant violation of basic principles with a harm so substantial that Kelnhofer was denied fundamental due process. See Mathews, 849 N.E.2d at 587. Kelnhofer has not established fundamental error.

III. Sentence

Kelnhofer also asserts that he was improperly sentenced. Kelnhofer first argues that his sentence may not exceed fifty-five years, the next highest class of felony above Class A, because serious violent felon in possession of a firearm is not a crime of violence. Although his crimes may have been an episode of criminal conduct, Indiana Code Section 35-50-1-2(c) does not cap Kelnhofer's sentence at fifty-five years.

Indiana Code Section 35-50-1-2(c) provides in part:

> The court may order terms of imprisonment to be served consecutively even if the sentences are not imposed at the same time. However, except for crimes of violence, the total of the consecutive terms of imprisonment, exclusive of terms of imprisonment under IC 35-50-2-8 and IC 35-50-2-10, to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct shall not exceed the advisory sentence for a felony which is one (1) class of felony higher than the most serious of the felonies for which the person has been convicted.

Voluntary manslaughter is defined as a crime of violence. Ind. Code § 35-50-1-2(a)(3).

Our supreme court has observed that the limitations on consecutive sentencing do not apply if the defendant is being sentenced for both crimes of violence and non-violent crimes. Williams v. State, 741 N.E.2d 1209, 1214 (Ind. 2001) (affirming consecutive sentences for murder, robbery, and attempted murder even though attempted murder was not included as a crime of violence). Thus, although serious violent felon in possession of a firearm is not a crime of violence, the trial court did not abuse its discretion in ordering Kelnhofer's sentences to be served consecutively because voluntary manslaughter is a crime of violence.

Kelnhofer also argues that the trial court improperly sentenced him to enhanced consecutive sentences. He asks that the fifteen-year sentences for serious violent felon in possession of a firearm convictions be reduced to the advisory sentence of ten years. He relies on this court's interpretation of a previous version of Indiana Code Section 35-50-2-1.3[2] in Robertson v. State, 860 N.E.2d 621 (Ind. Ct. App. 2007), trans. granted.

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[2] Effective July 1, 2007, the legislature amended Indiana Code Section 35-50-2-1.3 to read:

> (a) For purposes of sections 3 through 7 of this chapter, "advisory sentence" means a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence.
>
> (b) Except as provided in subsection (c), a court is not required to use an advisory sentence.
>
> (c) In imposing:
>
> > (1) consecutive sentences for felony convictions that are not crimes of violence (as defined in IC 35-50-1-2(a)) arising out of an episode of criminal conduct, in accordance with IC 35-50-1-2;

Prior to July 1, 2007, Indiana Code Section 35-50-2-1.3 provided:

> (a) For purposes of sections 3 through 7 of this chapter, "advisory sentence" means a guideline sentence that the court may voluntarily consider as the midpoint between the maximum sentence and the minimum sentence.
>
> (b) Except as provided in subsection (c), a court is not required to use an advisory sentence.
>
> (c) In imposing:
>
> > (1) consecutive sentences in accordance with IC 35-50-1-2;
> >
> > (2) an additional fixed term to an habitual offender under section 8 of this chapter; or
> >
> > (3) an additional fixed term to a repeat sexual offender under section 14 of this chapter;
>
> a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.

> > (2) an additional fixed term to an habitual offender under section 8 of this chapter; or
> >
> > (3) an additional fixed term to a repeat sexual offender under section 14 of this chapter;
>
> a court is required to use the appropriate advisory sentence in imposing a consecutive sentence or an additional fixed term. However, the court is not required to use the advisory sentence in imposing the sentence for the underlying offense.
>
> (d) This section does not require a court to use an advisory sentence in imposing consecutive sentences for felony convictions that do not arise out of an episode of criminal conduct.

(Emphasis added).

Luhrsen v. State, 864 N.E.2d 452, 455 (Ind. Ct. App. 2007), trans. denied. In interpreting this statute, the Robertson court held "that the advisory sentencing statute, IC 35-50-2-1.3, is clear and unambiguous and imposes a separate and distinct limitation on a trial court's ability to deviate from the advisory sentence for any sentence running consecutively." Robertson, 860 N.E.2d at 625. Other panels of this court have disagreed, concluding Indiana Code Section 35-50-2-1.3 only limits the sentence imposed for a non-violent episode of criminal conduct to the advisory sentence for a felony one class higher than the most serious felony of which the defendant was convicted. White v. State, 849 N.E.2d 735, 743 (Ind. Ct. App. 2006), trans. denied; see also Luhrsen, 864 N.E.2d at 456-57.

Our supreme court recently resolved this issue, holding, "We do not agree that subsection 1.3(c) represents a general requirement that a consecutive sentence be for the advisory term." Robertson v. State, No. 45S05-0704-CR-152, slip op. at 6 (Ind. 2007). Our supreme court concluded that the trial court was not required to impose the advisory sentence when sentencing Robertson to a consecutive term. Id. at 8. Thus, it was within the trial court's discretion to sentence Kelnhofer to enhanced sentences on the serious violent felon in possession of a firearm charges because they occurred as part of a crime of violence—voluntary manslaughter.

In sum, the trial court did not err in ordering Kelnhofer's sentences to run consecutively. Nor did the trial court err in sentencing Kelnhofer to fifteen years on each of the serious violent felon in possession of a firearm convictions. We affirm his sentence.

Conclusion

Even if the change of judge issue is not forfeited, the trial court properly denied Kelnhofer's motion for change of judge. The failure to instruct the jury that Kelnhofer had no duty to retreat did not amount to fundamental error. The trial court did not abuse its discretion in sentencing Kelnhofer to enhanced consecutive sentences. We affirm.

Affirmed.

KIRSCH, J., and ROBB, J., concur.